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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, APPELLANT,

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The oral opinion of the district court (App. A, *infra*, pp. 19–20) is unreported.

JURISDICTION

The judgment of the district court dismissing the government's complaint (App. B, *infra*, pp. 21–22) was entered on December 7, 1966. The United States filed a notice of appeal to this Court on December 19, 1966. The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States v. Con-*

tinental Can Co., 378 U.S. 441; *United States* v. *duPont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[1]

STATUTES INVOLVED

The pertinent portions of the Clayton Act and of the Bank Merger Act of 1966 are printed in App. C, *infra*, pp. 23–24.

STATEMENT

The Bank Merger Act of 1966 (App. C, *infra*, pp. 23–24), amending 12 U.S.C. 1828(c), provides in relevant part that a federal banking agency "shall not approve [a proposed bank merger] whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served"; if the agency

[1] When the district court dismissed the complaint, it also dissolved the automatic stay of the effectiveness of the Comptroller's approval provided by the 1966 Bank Merger Act. If probable jurisdiction is noted, we reserve the right to argue that the district court erred in so doing.

approves the merger, "[a]ny action brought under the antitrust laws" to challenge it must be commenced within thirty days; in any such action "the court shall review de novo the issues presented," and "the standards applied by the court shall be identical with those that the banking agencies are directed to apply."

The Act became effective on February 21, 1966. On May 12, 1966, First City National Bank of Houston and Southern National Bank of Houston entered into an agreement to merge. After the agreement was approved by the stockholders of each bank on or about June 16, 1966, an application for approval of the proposed transaction was made to the Comptroller of the Currency as required by 12 U.S.C. 1828(c). The Comptroller approved the proposed merger on September 20, 1966, although the Department of Justice and the Board of Governors of the Federal Reserve System had, pursuant to 12 U.S.C. 1828(c)(4), submitted reports to the Comptroller on the competitive factors involved, indicating that the merger would have substantial effects.

On October 10, the Department of Justice filed a complaint in the district court challenging the proposed merger on the ground that it might substantially lessen competition in violation of Section 7 of the Clayton Act. The complaint alleged the following facts:

First City is the largest commercial bank in Harris County, Texas, and in the Houston metropolitan area.[1a] Together with its affiliates, it accounts for about 29.6 percent of all commercial bank deposits in

[1a] The Houston Metropolitan Area consists of Harris, Brazoria, Fort Bend, Liberty, and Montgomery Counties.

Harris County. Southern National is the sixth largest commercial bank in Harris County and in the Houston metropolitan area. Together with its two affiliates it accounts for approximately 2.8 percent of all commercial bank deposits in the county. Commercial banking in Harris County is already heavily concentrated. The five largest commercial banks account for approximately 66.3 percent of all the deposits and 65.2 percent of all the loans of the 85 commercial banks located in the county, and this heavy concentration is in large part a direct result of past consolidations among banks in the area. The merger of First City and Southern National would produce a bank having (with its affiliates) at least 32.4 percent of all commercial bank deposits in the county, and would increase concentration among the five largest commercial banks in the Houston area to the point where they and their affiliates would account for about 78 percent of total commercial bank deposits.

On October 26, 1966, the Comptroller intervened as a party in the action (as permitted by the Bank Merger Act of 1966) and the next day moved to dismiss the complaint for failure "to state facts sufficient to support a cause of action * * *." On November 1, 1966, the defendant banks filed a motion for dissolution of the statutory stay[1] on the ground that the plaintiff has made no allegation in its complaint challenging the findings and the determinations of the Comptroller, that any anticompetitive effects re-

[1] Under the new act, commencement of the antitrust suit operates to stay consummation of the merger unless "the court shall otherwise specifically order."

sulting from the proposed merger are clearly outweighed in the public interest, as arbitrary, capricious or not supported by substantial evidence. Nor has the plaintiff alleged facts which constitute all the elements of a violation of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), which is the controlling statute in this case. Because plaintiff refuses to meet its statutory burdens there is no reasonable probability that it will prevail in the trial on the merits."

On November 10, 1966, the Comptroller issued an opinion stating why he had approved the merger. He concluded that the merger would have no adverse effect on competition and that, in any event, "any anti-competitive effects of this transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Houston area community * * *." On December 1, 1966—the day before the motions to dismiss and to dissolve the statutory stay were to be argued before the district court—the successor Comptroller (who had taken office subsequent to approval of the merger) issued a supplemental opinion. It concluded that the question of convenience and needs need not be reached because, although competition would be lessened, there were no substantial anticompetitive effects; and that even assuming that there were such effects they were outweighed by the "manifold advantages accruing to the Houston area."

After a hearing on December 2, the district court orally announced its ruling from the bench (App. A, *infra*, pp. 19-20). It held that, under the Bank Merger Act of 1966, the government is required to

plead and prove not only that the merger is anti-competitive, but also that the competitive injury is not outweighed by the convenience and needs of the community to be served. Accordingly, the court granted the Comptroller's motion to dismiss for failure to state a cause of action, but stayed dismissal for 10 days (from December 9, 1966, to the effective date of its judgment) in order to give the government an opportunity to amend its complaint. At the same time it also granted the defendant banks' motion to dissolve the statutory stay, to become effective (if the government did not amend) on the date of dismissal. (App. A, *infra*, p. 20). The government declined to amend, and on December 19, 1966, the court dismissed the complaint and dissolved the statutory stay.[1]

THE QUESTION IS SUBSTANTIAL

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, this Court held that bank mergers were subject to Section 7 of the Clayton Act, which proscribes mergers whose effect may be substantially to lessen competition. The Bank Merger Act of 1966 modifies the holding of *Philadelphia Bank* by providing that a bank merger is unlawful, if it may substantially lessen competition, unless the competitive effect is "clearly outweighed in the public interest" by the merger's "probable effect in meeting the convenience and needs of the community to be served." This appeal—the first case involving the new stand-

[1] The district court at the same time refused the government's request to stay consummation of the merger pending this appeal. On December 21, we filed a stay application with this Court.

ard to come before the Court—presents the fundamental question whether the 1966 Act requires the government to establish, as an essential element of violation of the antitrust laws that the adverse effects of a challenged merger are not clearly outweighed by considerations of community convenience and need.

1. It is settled law "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44-45; *Javierre* v. *Central Altagracia*, 217 U.S. 502, 508. The corollary—equally well recognized—is "that where a party relies upon a statute containing a general clause followed by an exception or proviso in a subsequent substantive clause, such exception is a matter of defense and need not be negatived." *United States* v. *King & Howe*, 78 F. 2d 693 (C.A. 2). The statutory syntax alone makes clear that the "convenience and needs" justification is an exception to the Act's general disapproval of anti-competitive mergers and must therefore be established by the defendant banks. The history of the Act provides clear confirmation that this was the congressional design.

This Court's decision in *Philadelphia Bank*, that Section 7 encompassed bank mergers, brought into sharp focus certain problems in the existing regulatory scheme applicable to those mergers. In passing on bank merger applications under the Bank Merger Act of 1960, the banking agencies were only required to consider competition as one of a number of equally weighted factors. On the other hand, after *Phila-*

Philadelphia Bank, it was clear that the courts were required to apply the standards of Section 7 of the Clayton Act—which makes no specific provision for such special features as commercial banking may involve.

Congressional dissatisfaction with these conflicting standards led to the introduction of bills and to the hearings and debates in Congress which resulted in the passage of the 1966 amendments to the Bank Merger Act. Experience with the application by the banking agencies of the 1960 Bank Merger Act was cited as demonstrating that it had not been adequate to check a wave of anti-competitive bank mergers. *E.g.*, 112 Cong. Rec. (daily ed.) 2337. On the other hand, some members of Congress feared that, despite this Court's suggestion that a somewhat expanded "failing-company" doctrine might be applicable in bank merger cases under Section 7 (see 374 U.S. at 372, n. 46), that statute might not permit the courts to consider some distinctive features of the banking industry that might be relevant to whether a merger should be approved—most notably the unique public interest in preserving solvent and viable banks. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3.

Congress resolved these problems in the 1966 Act by establishing a single standard, for both agency and court, under which a merger that might substantially lessen competition could not be approved unless "the anticompetitive effects of the proposed transaction are *clearly outweighed* in the public interest by the probable effect of the transaction in meeting the con-

venience and needs of the community to be served." [Emphasis added.]

The thrust of the new Act is thus to prohibit anti-competitive mergers, but to allow an *exception* to the basic prohibitory policy so as to accommodate the competing concerns voiced in the deliberations. The court below has held, however, that the district court cannot apply antitrust standards to enjoin a bank merger unless the government proves facts enabling the court to find that the merger's anti-competitive consequences are not clearly outweighed by the convenience and needs of the community. The practical effect of requiring the government to prove this negative proposition as an indispensable element of its antitrust case is to overemphasize the convenience and needs factor, by making the government's task in establishing the illegality of a challenged bank merger significantly more difficult than Congress intended.

Nor need we rest with an inference from the statutory design. There is express indication that the framers specifically intended the banks to bear the burden of showing offsetting factors of community convenience and needs. Thus the House Report[1] states:

> * * * the bill acknowledges that the general principle of the antitrust laws—that substan-

[1] The bill which became the 1966 Act, H.R. 12173, 89th Cong., was drafted in the House Banking and Currency Committee and introduced by its Chairman, Representative Patman. H. Rep. 1221, 89th Cong., 2d Sess. It was passed by the House and substituted for a related bill, S. 1698, which the Senate had passed in the previous session. 112 Cong. Rec. (daily ed.) 2333–2360. The Senate accepted the House substitute without a conference. 112 Cong. Rec. (daily ed.) 2537–2551.

tially anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served * * * that it would be in the public interest to permit it. [H. Rep. No. 1221, *supra*, pp. 3–4.][1]

[1] Similar statements were made by the Congressman primarily responsible for the bill. Congressman Patman, Chairman of the House Banking and Currency Committee and sponsor of the bill, stated:

> The single standard that the bill establishes is found in paragraph 5(b). This standard gives primary emphasis to the competitive factors in bank merger cases. It allows the competitive factor to be overridden only in those cases where it is established by the proponents of the merger that the convenience and needs of the community to be served by the merger clearly outweighs in the public interest the resulting diminution of competition. *It should be clearly noted that the burden of establishing such "convenience and needs" is on the banks seeking to merge,* and when we say clearly outweighed we mean outweighed by the preponderance of the evidence. [112 Cong. Rec. (daily ed.) 2333–2334; emphasis added.]

Congressman Reuss, one of the principal framers of the 1966 Bank Merger Act, pointed out:

> The way in which this factor of convenience and needs of the community to be served is juxtaposed against the antitrust competitive standard is important. It means that an anticompetitive merger should be approved only in a case where the proponents of a bank merger can establish that the advantage of the merger in terms of the convenience and needs of the community clearly outweighs the anticompetitive effects of the merger. This intentionally creates a heavy burden for the proponents of a merger, and I anticipate very few cases in which this burden could be established. [112 Cong. Rec. (daily ed.) 2337; emphasis added.]

In his dissenting views to the House Report, Congressman Todd observed:

> A leading proponent [of the bill], when asked what this bill

2. Defendants and the Comptroller base their argument that the government should bear the burden of negating the convenience and needs defense on what we believe is a fundamental misconception of the scheme of the Bank Merger Act of 1966. From the premise that the function of the district court in the antitrust action is simply to review the approval given the merger by the banking agency to determine whether the agency's action is supported by substantial evidence, they argue that the government must overcome the agency's finding. But, although such a solution was considered by Congress as a means of resolving the problems thought to have been created by the *Philadelphia Bank decision*,[*] it was rejected. The Act expressly states that in an action under the antitrust laws review by the district court of the issues shall be "de novo". This language was inserted at the urging of the Attorney General, who argued to Congress that the court in an antitrust case should *not* function as a court reviewing an administrative agency's findings, but, rather, should freshly reexamine all of the issues involved, in determining

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was intended to do, stated that the language of section 5 was changed from earlier proposals for the purpose of making it clear that the competitive factors are in a sense preeminent, and that as far as section 1 of the Sherman Act and section 7 of the Clayton Act are concerned, *the burden of proof shall be upon the merging institutions to show that any substantial lessening of competition caused by the merger is clearly outweighed in the public interest.* [H. Rep., *supra*, pp. 37–38; emphasis added.]

[*] See H.R. 11041, introduced by Congressman Ashley on September 15, 1965.

whether the bank merger should be allowed." The Attorney General's suggestion was adopted. In commenting upon the de novo feature of the Act, Repre-

"The Attorney General wrote to the House of Representatives:

> I am opposed to particular procedures set forth in H.R. 11011. [A predecessor of the bill that became the 1966 Bank Merger Act.] The bill provides for review in a court of appeals on the basis of a "record" upon which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.
>
> Consequently, while I am sympathetic to efforts to clarify through legislation the application of antitrust law to banks, I believe that the current practice, whereby the Department of Justice institutes proceedings in Federal district courts against mergers which it believes to be unlawful, should be allowed to continue; so that there could be a trial de novo of all issues in any such suit. [Letter to Wright Patman, Chairman, Banking and Currency Committee, U.S. House of Representatives, from Nicholas deB. Katzenbach, Attorney General, dated September 24, 1965, H. Rep., *supra*, pp. 9–10.]

sentative Patman stated (112 Cong. Rec. (daily ed.) 2335):

> The intent here is to have the court completely and on its own make a determination as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5(B) of the bill. The court is not to give any special weight to the determination of the bank supervisory agency on this issue, but is to independently make a judgment as to whether the merger should be approved on the basis of the evidence presented to the court.

Representative Reuss, one of the bill's principal authors, stated:

> I would also like to emphasize that this bill makes the courts the complete and final arbiter of whether a bank merger should be approved under the standard established by this legislation. This is accomplished by providing for de novo review in a Federal court of any bank merger approved by a bank supervisory agency and challenged in the courts by the Justice Department. In such a case, the court shall determine independently of the decision of the supervisory agency, on the evidence presented to it, whether the proposed merger violates the standard established in paragraph (5) of this bill. [112 Cong. Rec. (daily ed.) 2338; see, also, remarks of Representative Multer (112 Cong. Rec. 2336-2337).]

There is, then, no basis for analogizing the present case to a case involving court review of an administrative finding.[7]

[7] The independent role of the antitrust court is demonstrated by the Bank Holding Company Act of 1966, 80 Stat. 236, passed

(13) The wisdom of applying the normal rule of statutory construction—and so of requiring the defendant banks to establish a "convenience and needs" justification—is particularly evident here. First, it is far easier for defendants to bear the burden of proof on this issue than it is for the government to do so. See *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 74. Evidence showing whether or not the merger will have substantial beneficial effects is more likely to be in the possession of the defendants. Certainly the banks are more intimately familiar than the government with their own "financial and managerial resources and future prospects"—the factors specifically mentioned in the Act (App. C, *infra*, p. 24)—and evidence concerning these matters is essential to determine whether the merger is justifiable because necessary to prevent a bank from floundering and thereby endangering the unique community interest in preserving solvent and viable banks (see House Report, p. 3). There is a close analogy here to non-banking merger cases, where—no one disputes—the

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by the same session of Congress. This statute extended to bank holding companies provisions almost identical with the Bank Merger Act, including an antitrust action in the district court under the same standards the agency applies. It also continued in effect pre-existing provisions for judicial review of the banking agency's decision in the courts of appeals (80 Stat. 236, 240). The district court and the appellate proceedings are not parallel judicial reviews however. As in the Bank Merger Act, the district court is "to review *de novo* the issues presented" (80 Stat. 240); in contrast the courts of appeals are limited to traditional substantial evidence review of agency action (12 U.S.C. 1848). Thus Congress has clearly distinguished the two types of proceeding in a contemporaneous statute *in Pari materia* with the Bank Merger Act.

burden of pleading and proving the "failing company" defense is on the defendants. In this case, since defendants and the Comptroller urge very broad and general benefits to the community flowing from the creation of a larger bank with larger resources, the same considerations of convenience and capability of proof apply *a fortiori*.

Furthermore, to require the government to show that the "convenience and needs" justification does not exist is to demand proof of a negative. Even if the government refutes some alleged benefits, how is it practicably to establish that there are *no* others, the existence of which it did not suspect? To prove that the merger is not, in fact, necessary to achieve the benefits that are claimed for it also involves speculation and conjecture. There is thus sound practical reason for following the normal rule of evidence that the party asserting an affirmative bears the burden of proof. Cf. 9 Wigmore, *Evidence* (3d ed), § 2486. Also, to require the government to bear the burden of proof would conduce to disorderly and wasteful procedure. The government might have to go into the "convenience and needs" issue twice, first building a hypothetical case based upon the benefits that it thought defendants were likely to claim, and then one based upon the benefits that defendants actually claimed.[*]

[*] Consistent with their position taken in their motion to dissolve the stay, defendants may urge that these problems cannot arise: they view this proceeding as one to review the determinations made by the Comptroller, and hence they may argue that the only issues of convenience and needs open in the district court

In these ways the ruling below seriously impairs effective enforcement of the antitrust laws against bank mergers under the new standard.

4. The question presented is plainly substantial. It is of great importance to the administration of the antitrust laws that it be resolved promptly. Antitrust proceedings involving mergers in five other major banking markets are pending in the district courts at present,[8] and several courts have already held that the government must bear the burden of proof on the convenience and needs issue, reasoning that on this issue they function only as reviewing courts to which the government must show that the banking agencies' finding are not supported by substantial evidence. *United States* v. *Provident National Bank, et al.*, 1966 Trade Reg. Rep., ¶ 71,940; *United States* v. *Third National Bank of Nashville, et*

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involve those findings upon which he relied. This argument reveals the full extent of the disagreement between the parties and the basic nature of the issue. We believe for the reasons stated above that Congress in the 1966 Bank Merger Act did not intend the district court, in "an action brought under the antitrust laws" in which the statutory issues are to be reviewed de novo, to conduct merely a proceeding to review the Comptroller's decision. (In a de novo proceeding the banks would not, of course, be limited to urging only those "convenience and needs" factors relied on by the agency.)

[8] *United States* v. *Mercantile Trust Company, et al.*, E.D. Mo., No. 65 C. 241(1) (St. Louis); *United States* v. *Provident National Bank, et al.*, E.D. Pa., No. 40032 (Philadelphia); *United States* v. *Third National Bank of Nashville, et al.*, M.D. Tenn., No. 3849 (Nashville); *United States* v. *Crocker-Anglo National Bank, et al.*, N.D. Cal., No. 41808 (San Francisco); *United States* v. *First National Bank of Hawaii, et al.*, D. Hawaii, No. 2540 (Hawaii).

al., 1966 Trade Reg. Rep., ¶ 71,934; *United States* v. *Crocker-Anglo National Bank, et al.*, 1966 Trade Reg. Rep., ¶ 71,898. The court below appears to have relied on these cases in its decision, and similar rulings may be anticipated.

Clarification of the elements that the government must plead and prove in order to establish a *prima facie* antitrust case, in light of the Bank Merger Act of 1966, is necessary not only to provide guidance for the many cases already in litigation but also to shape the government's program of future litigation. In pending cases, an authoritative decision settling the burden of proof issue will avoid the waste of valuable time and resources in prolonged litigation under possibly erroneous standards. As for future cases, we point out that the wave of bank mergers that began 16 years ago and has not abated. Our records show that more than 120 mergers were approved by the banking agencies in this year alone. The Department of Justice reported adverse competitive consequences to the banking agencies in a number of these and is studying the possibility of suit. Whether and when to sue depends significantly on how much it must prove.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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DECEMBER 1966.

APPENDIX A

[Caption omitted]

EXTRACT FROM TRANSCRIPT OF PROCEEDINGS, DECEMBER 2, 1966

The COURT. I am of the view in the light of these few authorities which we have at this time that the act of 1966 made some rather substantial changes in the law. I understand the case is to hold the burden to be on the plaintiff to allege and prove an anti-competitive result of the merger, and further that that is not outweighed by the convenience and needs aspect of the matter.

I think the Department of Justice has continued for reasons of its own to adopt a contrary interpretation which, of course, may or may not be accurate, these cases not having yet reached the appelate [*sic*] level, but I consider them as authoritative, at least at this time.

I think that the petition fails to state a cause of action in that it alleges only the first step and not the second step which is necessary for the plaintiff to support.

I have no desire to dispose of a case of this kind on a question of pleading. I think that was the view that influenced the other Judges that had the same matter before them when they spoke of notice pleading. That, however, isn't a case—well, this present case is one where all parties have acted with their eyes open. Both the plaintiff and the defendants have

known precisely what they were doing. If they do not allege a case in their present petition, then Justice has done that because it desired to do so.

I will sustain the motion to dismiss for failing to state a cause of action. I will give the government if it wishes an opportunity to amend and to allege a cause of action as I understand is required by the authorities to date.

Let us say within ten days?

* * * * *

The Court. I had not quite concluded, but I would dissolve the injunction in light of this action, provided that you may amend within ten days if you wish,

APPENDIX B

United States District Court for the Southern District of Texas, Houston Division

Civil Action No. 66-H-695. Filed December 7, 1966

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON, DEFENDANTS, AND JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, INTERVENOR.

Judgment

The above cause came on to be heard on the 2nd day of December, 1966, on the Motion For Dissolution Of Statutory Stay of defendants, First City National Bank of Houston and Southern National Bank of Houston, and the Motion To Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency, and came the plaintiff, defendants and intervenor by and through their respective attorneys of record and announced ready for the hearing on said Motions; thereupon, the Court, after hearing the pleadings, evidence and argument of counsel, is of the opinion and so finds that the Motion To Dismiss of the Intervenor should be granted with leave of the plaintiff to amend its complaint within ten (10) days and that as a result thereof, Defendants' Motion For Dissolution Of Statutory Stay should be granted.

It is, therefore, ORDERED that the Motion to Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency be granted and this cause will be dismissed unless plaintiff shall amend his complaint within ten (10) days from the effective date hereof.

It is further ORDERED that the Motion for Dissolution of Statutory Stay of First City National Bank of Houston and Southern National Bank of Houston will be granted, effective on dismissal of the action.

It is further ORDERED that this judgment is and shall become effective at 12:00 o'clock Noon on December 9, 1966.

ENTERED on this 7th day of December, 1966.

(S) BEN C. CONNALLY,
United States District Judge.

APPENDIX C

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act, as amended, 80 Stat. 7, 12 U.S.C. 1828(c) (1966 Supp.), provides in pertinent part:

> (5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the

proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

* * * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(7)(B). In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of [Title 15], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

U.S. GOVERNMENT PRINTING OFFICE: 1966